Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GRAHAM C. FARIA,

Petitioner,

v.

TOWN OF PALM BEACH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Americans With Disabilities Act of 1990, is the issue of whether a job applicant poses a direct threat to the health or safety of others an element of a plaintiff's prima facie case for discrimination or is it an affirmative defense?

PARTIES BELOW

The Petitioner, Graham C. Faria, was the Plaintiff / Appellant in the courts below.

The Town of Palm Beach was the Defendant / Appellee in the courts below. Joseph Terlizzese, the Chief of Police, was initially named as a Defendant but was dismissed by the district court.

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IN THE
SUPREME COURT OF THE UNITED STATES
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GRAHAM C. FARIA,

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vs.

TOWN OF PALM BEACH,

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OPINIONS BELOW

The Eleventh Circuit's opinion is unreported, and is reprinted in the appendix at App. 1a. The district court's order granting summary judgment is unreported, and is reprinted in the appendix at App. 2a.

STATEMENT OF JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the district court was pursuant to 28 U.S.C. § 1331. Judgment was entered on December 17, 1998.

STATUTORY PROVISIONS INVOLVED

Americans With Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq.*

§ 12112. Discrimination
(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

§ 12113. Defenses
(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or

selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

§ 12111. Definitions

(3) Direct Threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

STATEMENT OF THE CASE

"[W]e didn't call your doctor or look at any of your blood tests, because these incident reports are enough to fail you. . . . We don't hire diabetics, we have had problems with them in the past." This statement, made by a physician to the Petitioner, Mr. Graham Faria, during a pre-employment medical examination for the Town of Palm Beach ("Palm Beach"), Florida, captures the essence of this case in the district court.

Petitioner, an experienced law enforcement officer who is an insulin-dependent diabetic, applied for employment with the police department of Palm Beach. Although Petitioner passed all physical fitness and other pre-employment tests, and was in excellent health when he applied for a position as a police officer, Palm Beach refused to hire him stating that he could not perform the essential functions of the job, and that the medical examination revealed he posed a significant risk of harm to himself and others which could not be safely accommodated.

Petitioner brought an action in district court against Palm Beach and the Chief of Police asserting, *inter alia*, discrimination against him as a diabetic, in violation of the Americans With Disabilities Act of 1990 ("the ADA"). The case proceeded against Palm Beach only on the ADA claim.

Following discovery, Palm Beach filed a motion for summary judgment claiming, *inter alia*,

that Petitioner was not disabled as defined by the ADA, and that he was not a qualified individual under the ADA because the possibility of a hypoglycemic occurrence on the job rendered him a direct threat to the health and safety of others.

The district court granted summary judgment for Palm Beach. The district court found Petitioner met the definition of disabled, but granted summary judgment on the ground that "[n]o genuine issues of material fact exist with respect to whether Faria is a qualified individual under the ADA." App. 10a, 13a. In reaching this decision, the district court applied *Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996), and said "[t]he employee retains at all times the burden of showing that he was not a direct threat or that reasonable accommodation was available to eliminate the threat." App. 11a. The district court thus placed the burden on Petitioner to prove a negative---that he would not present a direct threat to others if hired as a police officer. App. 11a-13a.

On appeal the Eleventh Circuit Court of Appeals affirmed *per curiam*. App. 1a. This petition followed.

REASON FOR GRANTING THE WRIT

This Court should resolve the conflict among the circuit courts on whether the burden to prove a direct threat of harm rests with the plaintiff or defendant.

The circuit courts of appeals are in conflict on which party bears the burden to prove that the employee or job applicant who is disabled under the ADA does not pose a direct threat of harm to others. *See* 42 U.S.C. § 12113. Two courts have squarely held it is the plaintiff's burden and two courts have squarely held it is the defendant's burden.

1. The Eleventh and First Circuits Burden the Plaintiff

The Eleventh Circuit placed this burden on Petitioner. *See Moses v. American Nonwovens, Inc.*, 97 F.3d 446 (11th Cir. 1996)(holding "[t]he employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available").

The First Circuit in *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997), arrived at the same conclusion. The court found §§ 12112 and 12113 did not resolve who bears the burden of proof on the direct threat issue. Turning to legislative history for guidance, the circuit court quoted the House Report, saying with respect to "the definition of 'direct threat,'

'[t]he Committee intends to codify the direct threat standard used by the Supreme Court in *School Board of Nassau County v. Arline* [480 U.S. 273 (1987)].'" 110 F.3d at 143 (footnote and citation omitted). Further quoting the House Report, the circuit court noted that "'[i]f the applicant is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless the employer can demonstrate that the applicant's disability poses a direct threat to others in the workplace. . . . The plaintiff is not required to prove that he or she poses no risk.'" *Id.* (citation omitted).

The First Circuit interpreted the intent to codify *Arline* as suggesting the plaintiff must prove the disability poses no risk of harm to others as part of proving he or she is qualified for employment. The court thus held that when a disabled employee's essential job functions necessarily implicate the safety of others, the employee must demonstrate those functions can be performed without endangering others, but did not adequately distinguish the excerpt from the House Report placing the burden on the employer without exception. *Id.*

2. The Fifth and Eighth Circuits Burden the Defendant

In contrast, the Fifth and Eighth Circuits have held that the direct threat issue is an affirmative defense on which the employer bears the burden of proof. *See Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 764 (5th Cir. 1996)("As

with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat"); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995)(acknowledging the employer's burden to prove employee cannot perform job functions even with reasonable accommodation).

In *Benson*, the Eighth Circuit distinguished the plaintiff's burden of proof from the defendant's burden of production:

> Once the plaintiff makes 'a facial showing that reasonable accommodation is possible,' the burden of *production* shifts to the employer to show that it is unable to accommodate the employee . . . If the employer shows that the employee cannot perform the essential functions of the job even with reasonable accommodation, the employee must rebut that showing with evidence of his individual capabilities. At that point, the employee's burden merges with his ultimate burden of persuading the trier of fact that he has suffered unlawful discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207 (1981)(Title VII case) *quoted in Hicks*, ___ U.S. at ___, 113 S. Ct. at 2752.

62 F.3d at 1112 (citations and footnotes omitted)(emphasis in original).[1] The inquiry as to whether the plaintiff poses a direct threat of harm is subsumed in the employer's burden to produce evidence that the plaintiff cannot perform the essential job functions even with reasonable accommodation.

The Seventh Circuit seems to be aligned with the Fifth and Eighth Circuits in *E.E.O.C. v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995). Although the burden of proof question was not squarely presented, the court repeatedly referred to the direct threat issue as a defense. *Id.* at 1283-84.

CONCLUSION

For the foregoing reason, certiorari should be granted, the decision of the circuit court reversed, and the case remanded for trial with instructions for Palm Beach to bear the burden to prove Petitioner poses a

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[1] In *Moses*, the Eleventh Circuit overstated the holding of *Benson*. The Eighth Circuit said: "The employee at all times retains the burden of persuading the trier of fact that he has been the victim of illegal discrimination due to his disability." 62 F.3d at 1112. The Eleventh Circuit cited *Benson* for the proposition that the employee retains the burden to prove he was not a direct threat. 97 F.3d at 447. The burden to prove illegal discrimination is not the same as the burden to prove the direct threat defense. In fact, the direct threat issue was not presented to the Eighth Circuit in *Benson*. 62 F.3d at 1112.

direct threat of harm to others even with reasonable accommodations for his diabetes.

Respectfully submitted,

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